

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

CHRIS JENSEN HEALTH & REHABILITATION
CENTER, LLC

Employer/Petitioner

and

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES COUNCIL 5

Union

Case 18-UC-429

DECISION AND CLARIFICATION OF BARGAINING UNIT

The Employer/Petitioner (Employer) seeks to exclude from a wall-to-wall bargaining unit of employees employed by the Employer at its Duluth, Minnesota facility the following classifications: Administrator, Directors, RN Managers, RN Supervisors, Staff Education Manager, Clinical Reimbursement Nurses, HR/Payroll/Accounts Payable Specialist, Volunteer Coordinator/Administrative Assistant, the Assistant to the Director of Nursing/Scheduler, and Social Workers. The Employer contends that the employees in these classifications are managerial, supervisory, or confidential, and therefore must be excluded from the unit. With regard to the Social Workers, the Employer argues, in the alternative, that if they are not supervisors or confidential employees, they should be excluded as professional employees.

Contrary to the Employer, the Union contends that all positions are appropriately included in the unit and argues that the Employer has not met its evidentiary burden to

exclude any of the positions in dispute. Remarkably, the Union identifies no other classifications as supervisors, and therefore appears to take the position that the Employer has no supervisors or managers. With regard to the Employer's alternative argument that the Social Workers are professional employees, the Union does not dispute that the Social Workers are professionals, but does not believe that a formal *Sonotone* election is necessary to include them in the unit.

After carefully reviewing the record, relevant Board cases, and the briefs submitted by the parties, I conclude that the unit should be clarified to exclude the following positions: Administrator, Director of Nursing, Business Office Manager, Environmental Services Director, Maintenance Director, Admissions Director, Human Resources Director, Activities Director, Clinical Reimbursement Director, Dietary Director, Health Information Director, Social Services Director, RN Managers, RN Supervisors, Staff Education/Infection Control Manager, Assistant to the Director of Nursing and Administrative Assistant/Volunteer Coordinator as being managers, statutory supervisors, or confidential employees. I further conclude that there is insufficient evidence to establish that the RN Assessment Coordinators are statutory supervisors, managers, or confidential employees, or that the HR/Payroll/Accounts Payable Specialist is a confidential employee. Finally, I will clarify the unit to exclude Social Workers because they are professional employees and have been historically excluded from the unit otherwise agreed to by the parties.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹

3. The parties stipulated that the Union is a labor organization within the meaning of the Act. The labor organization involved claims to represent certain employees of the Employer.

This decision consists of four sections. The first provides an overview and background information. The second section summarizes the Employer's operation and organizational structure. Third, I describe applicable legal standards for unit clarification petitions and burdens of proof, and I summarize Board law for finding employees to be managers, Section 2(11) supervisors or confidential employees. Finally, I describe in detail each classification in dispute, including my conclusion regarding whether to exclude the classification from the unit.

Overview and Background Information

The Employer operates a 170-bed, licensed skilled nursing home in Duluth, Minnesota. Prior to November 1, 2009, the nursing home was publicly owned by St. Louis County. All employees, with the exception of the administrator, were included in one of five bargaining units represented by the Union under the Minnesota Public Employees Labor Relations Act. The five units included the "basic health unit" which

¹ The Employer, Chris Jensen Health & Rehabilitation Center, LLC, a Minnesota corporation, operates a licensed skilled nursing home at its Duluth, Minnesota facility. During the past calendar year, a representative period, the Employer purchased and received goods in excess of \$50,000 directly from points located outside the State of Minnesota, and derived gross revenue in excess of \$250,000.

included most employees, including non-professional employees and registered nurses. A second unit consisted of social workers. Other units included one for confidential employees, one for “basic supervisory” employees, and one for “civil service” employees. However, on November 1, 2009, the facility was sold by St. Louis County and became Chris Jensen Health & Rehabilitation Center, LLC, which is now managed by Health Dimensions Group.

Since its acquisition of the facility, the Employer has recognized the Union as the representative of the employees, and the parties have bargained for a contract for a single bargaining unit. At the time of the hearing, the parties had reached a tentative agreement on a contract, but could not agree on the placement of the classifications which are the subject of this petition.

The Employer’s Operation and Organizational Structure

The Employer employs 214 employees (including all disputed classifications except the administrator) at its Duluth facility. The facility consists of four floors and is divided into five areas. The five areas are Spruce Station, focused on rehabilitation; Willows Station, for Alzheimer’s and dementia patients; Cedar Station, a total-care behavioral area; and Birch and Elm Stations, typical long-term care areas.

The Employer’s Duluth facility is run by Administrator Pat Voelker. Voelker is employed by Health Dimensions Group, the management company for the Employer. Voelker reports to Mark Pederson, the Regional Director of Operations at Health Dimensions Group. Health Dimensions holds the license for the facility, runs the

facility, and leases the building from St. Louis County. Reporting directly to Voelker are the 11 Directors,² as well as the Administrative Assistant/Volunteer Coordinator.³

Thus, the next level of the organizational hierarchy under the Administrator is the 11 Directors in dispute. Each Director is responsible for a department. The nursing department is the largest department, with approximately 130 employees. The RN Managers and RN Supervisors, who are also in dispute, report to the Director of Nursing and comprise an intermediate level of supervision in the nursing department.

The Employer offers two different benefit plans. The managers all receive the management benefits, and the remaining employees receive the staff benefits. The Administrator, Directors, RN Managers and Social Workers are considered exempt employees by the Employer and are salaried. The rest of the employees are paid hourly.

Applicable Legal Standards

Applicable Legal Standard for Unit Clarification Petitions and Burdens of Proof

Assuming a petition is timely filed, the Board will clarify a unit to exclude a classification that historically has been included in the unit where the petitioner has established a statutory basis such as supervisory status for exclusion. In *Goddard Riverside Community Center*, 351 NLRB 1234, 1235 (2007), quoting *Washington Post Co.*, 254 NLRB 168 (1981), the Board explained that when presented with a UC

² There are actually 12 directors listed on the organizational chart in evidence as Employer Ex. 1. Administrator Voelker testified, however, that the position listed as Therapy is currently outsourced.

³ The organizational chart identified a CSR position as also reporting directly to the Administrator. It is not clear if the position currently exists, but in any event it has not been raised by either party as in dispute.

petition, it is “*required* to exclude positions from a unit where the inclusion of those positions would violate the basic principles of the Act.” *Id.* at 1236. This is true even where the employees sought to be excluded have long been included under previous contracts, and the job duties of those positions have remained unchanged. Thus, if it can be shown that those employees meet the test for supervisory status, the Board is compelled to exclude them. *Id.* See also *Bethlehem Steel Corp.*, 329 NLRB 243, 244 fn. 5 (1999) (noting that the Board will clarify a unit to exclude a position that has historically been included where the petitioner has established a statutory basis for the exclusion).

However, the Board also requires that the party asserting that an individual be excluded from a bargaining unit by either a statutory exclusion or policy consideration has the burden of proof. See *George L. Mee Memorial Hosp.*, 348 NLRB 327, 333 (2006), and *Union Square Theater Management*, 326 NLRB 70, 71 (1998) (managerial status); *Bennett Industries*, 313 NLRB 1363 (1994) (supervisory status); *Foodbasket Partners, LP*, 344 NLRB 799, 805 (2005) (confidential status). Any lack of evidence in the record is construed against the party asserting the exclusionary status. See generally *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999) (supervisory status). The Board has also long recognized that purely conclusionary evidence is not sufficient to establish supervisory (or managerial or confidential) status. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991).

While conclusionary statements are generally not sufficient, on the other hand, I note that evidence and testimony provided by the Employer are entirely un rebutted.

The Union chose not to call any witnesses or introduce any documents, and conducted very limited cross examination of the Employer's witnesses. The Union rests its case on the contention that the Employer failed to meet its burden of proof, rather than disputing the evidence introduced at the hearing.

Applicable Legal Standard for Managerial Status

Although the Act makes no provision for "managerial employees," this category of personnel has been excluded from the protection of the Act by Board policy. It is "reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management." *General Dynamics*, 213 NLRB 851, 857 (1974). The Supreme Court defines managerial employees as those who "formulate and effectuate management policies by expressing and making operative decisions of their employer." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). These individuals are "much higher in the managerial structure" than those explicitly mentioned by Congress which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was found necessary." *Id.* at 283. The Court has further clarified that an employee may only be excluded as managerial if he "represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980). Further, managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. *Id.*

Applicable Legal Standard for Statutory Supervisors

Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive; the possession of any one of the authorities listed is sufficient to confer supervisory status. See *KGW-TV*, 329 NLRB 378, 381 (1999), and *Mississippi Power & Light Co.*, 328 NLRB 965, 969 (1999), citing *Ohio Power v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The requirement of the use of independent judgment, however, is conjunctive; thus, an individual is not a supervisor unless he/she exercises an authority with the use of independent judgment and holds the authority in the interest of the employer. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006), the Board interpreted the term “independent judgment” to refer to the degree of discretion involved in making a decision rather than the kind of discretion involved (e.g., professional or technical). An individual must form an opinion or evaluation by comparing and discerning data in order for it to be considered “independent” within the meaning of Section 2(11). *Id.* at 692-693. The Board noted that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* On the other hand, an individual can exercise independent judgment where there is a guiding policy that allows for discretionary choices. *Id.*

Applicable Legal Standard for Confidential Employees

“Confidential employees” are defined as employees “who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations.” *NLRB v. Hendricks County Elec. Membership Corp.*, 454 U.S. 170, 188-189 (1981) (citation omitted). In addition, the Board considers to be confidential those employees who “have ‘regular’ access to confidential information concerning anticipated changes that may result from collective-bargaining negotiations.” *Crest Mark Packing Co.*, 283 NLRB 999 (1987); see also *Pullman Standard Division of Pullman, Inc.*, 214 NLRB 762, 762-763 (1974). An employee who merely has access to confidential information is not, without more, a confidential employee. *Bakersfield Californian*, 316 NLRB 1211 (1995).

This standard is to be narrowly construed, and the factors are to be applied in the conjunctive. *Weyerhaeuser Co.*, 173 NLRB 1170 (1968); *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956).

The Duties and Authority of the Disputed Classifications and My Conclusions on Their Status

Administrator

As already noted, Pat Voelker is the Administrator of the Duluth facility, a position she has held since October 2008, prior to the sale of the business to the Employer by St. Louis County. The Administrator is the only position in dispute that has never been included in a bargaining unit, even when the facility was owned by the County.

The Administrator is “totally responsible for the building 24/7.” Voelker testified that she created the job descriptions for all the employees, wrote the employee

handbook, hired nine of the 11 directors and performs their evaluations (although no evaluations have been conducted since the sale). Voelker also participated in labor negotiations for the Employer, as did the Employer's attorney, HR Director Colleen Conley, and a representative from Health Dimensions Group.

The Employer contends that the Administrator should be excluded from the unit as a managerial and supervisory employee. The evidence establishes that Administrator Voelker wrote the employee handbook and developed all of the job descriptions and therefore clearly "formulates and effectuates management policies by expressing and making operative the decisions of their employer." *Bell Aerospace*, 416 U.S. at 288. Therefore, I find that the Administrator is appropriately excluded as a managerial employee. Similarly, there is more than enough evidence in the record to show that the Administrator possesses several indicia of statutory supervisory authority. In particular, I note that the administrator is in charge of hiring and firing for the entire facility and did most of the hiring for the facility when it was purchased from the County, including the 11 directors. Based on the ample record evidence, I find that the Administrator is a supervisor within the meaning of Section 2(11) of the Act and is properly excluded from the bargaining unit.

Directors

Currently 11 Directors report to Administrator Voelker. They are the Business Office Manager, the Human Resources Director, the Director of Nursing, the Clinical Reimbursement Director, the Activities Director, the Dietary Director, the Admissions Director, the Health Information Director, the Environmental Services Director, the Maintenance Director, and the Social Services Director. Administrator Voelker testified

generally that all Directors are responsible for their individual departments. They hire, fire, perform evaluations, conduct investigations, and manage their own budget for their areas. Budgeting is determined based on the patient census. With the exception of the Admissions Director, all of the Directors have employees reporting directly to them.

All Directors are salaried and receive the management benefits. They also attend daily and monthly meetings with the Administrator. The purpose of the daily meetings is to discuss operation for the day, while the monthly meetings are held off-site, require two hours, and are a review of budget and policy.

The Employer contends that the Directors should be excluded from the unit, as they are managerial and/or supervisory and, in some cases, confidential. I find there is sufficient evidence to support the Employer's contention that the Directors are statutory supervisors and managers. With regard to their status as statutory supervisors, I note, in particular, the following uncontested specific examples of Directors exercising the statutorily enumerated indicia of supervisory authority:

- Business Office Manager Tracey Halverson supervises the two accounts receivable specialist positions and a receptionist. She hired Jackie Johnson, one of the accounts receivable specialists.
- Environmental Services Director Mary Ann Strohman supervises the approximately 15 environmental service attendants (ESAs). She hired temporary workers to clean the whole building when the Employer first purchased the building, and at least some of them are moving into permanent positions in her department, which is also Strohman's decision. Strohman also developed the schedules for cleaning the facility and created task lists for the ESAs. Strohman suspended a worker for swearing and has disciplined employees for attendance issues. Strohman manages the environmental services budget and, at the time of the hearing, was in negotiations with a new vendor for bulk linens.
- Activities Director Brenda Glonek is responsible for managing the activities department, which includes overseeing approximately five activities aides/attendants. Administrator Voelker testified that Glonek recently

made the decision to change her staff's schedules to part-time from full-time to allow for more coverage. Glonek also established the schedule for her staff.

- Dietary Manager Deb Davis directly supervises the approximately 20 employees in her department. Davis terminated an employee in December for theft and more recently suspended an employee for attendance issues, which turned into a termination.
- Health Information Director Holly Karjala is responsible for overseeing the five health unit coordinators (HUCs). Karjala hired three of the five HUCs on staff. In addition, Administrator Voelker testified that Karjala recently changed the schedule of the HUCs so that there was no Sunday overage and more coverage Monday through Friday.
- Maintenance Director Mike Smith has two maintenance workers, or technicians, reporting to him. He hired three employees: the two reporting to him and one to replace an employee who left.
- The Director of Nursing (DON) fills in for the Administrator when Voelker is out; evaluates nursing managers, nurse supervisors, the staffing coordinator, and team leads; and has the authority to discipline.

The job descriptions further support Voelker's testimony that all the Directors, with the exception of the Admissions Director, are responsible for the hiring and disciplining of their department staff. The fact that not all Directors have exercised their authority to hire or discipline does not negate a finding of supervisory status, since it is not necessary that all individuals in the disputed classification have exercised their actual authority. *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999). It is clear to me that there is more than enough evidence in the record to show that the Directors possess several of the indicia of supervisory authority enumerated in Section 2(11) of the Act, and therefore should be excluded from the bargaining unit.

In addition to finding that the Directors are properly excluded from the unit as supervisors within the meaning of Section 2(11) of the Act, I find that they are also

managers and appropriately excluded from the bargaining unit on that basis as well. In particular, I rely upon Administrator Voelker's testimony that the Directors are responsible for implementing policies and procedures for their departments. This testimony is further supported by the following specific examples of Directors implementing policies for the Employer:

- Director of Nursing Moore implemented a policy for taping reports from shift to shift to improve communication among the nursing staff.
- Business Office Manager Tracey Halverson was involved in creating the policies relating to collections for the facility detailing when and how collections occur.
- Human Resources Director Colleen Conley recently developed a system for internal job posting and trained the other Directors at a Directors meeting on how to implement it in the facility. She also developed policies for recruitment, retention, benefit administration and compensation administration. In addition, Conley set up a new billing system and oversaw the implementation of the new payroll system.
- Director of Admissions Cindy Polzin is the first contact for the Employer with the community and is responsible for marketing the facility. She spends the majority of her time outside the facility meeting with hospital personnel, doctors, and others who have the potential to admit a resident to the facility. While Polzin does not supervise anyone directly, she has the authority to correct staff if she sees something is not done properly. For example, if she sees a bed is not made, she can seek out a nursing assistant and have that person redo the work. Polzin has a budget and the authority to make decisions on purchases for items to give away at health fairs.
- Health Information Director Holly Karjala is currently developing her own chart order for the facility to follow with regard to what documents must be maintained in a resident's chart. In addition, she ensures that the Employer is meeting HIPPA rules, audits charts, and assisted the Administrator in developing a bargaining strategy prior to negotiations with the Union.

These examples support Administrator Voelker's testimony and demonstrate that the Directors are "closely aligned with management as true representatives of

management” and are properly excluded from the unit. *General Dynamics*, 213 NLRB 851,857 (1974)

RN Managers

The Employer employs five RN Managers. They are Patty Rich, Amanda Simpson, Kathie Killoran, Pat Smith, and Amy Schulte. They are scheduled Monday through Friday during the daytime shift, and each rotates working every seventh weekend when she is considered the house supervisor and is the only management person in the building. (Also included in the rotation are two assessment coordinators, described later herein.) Each RN Manager is in charge of one of the five stations previously described. Administrator Voelker testified that the RN Managers are responsible for their stations 24/7, including making sure that residents’ needs are met and that the facility is in compliance with regulations. The RN Managers do not perform nursing duties and are not assigned a patient load. They are responsible for determining if an incident needs to be reported under vulnerable adult reporting requirements. The RN Managers report to the Director of Nursing.

Each station’s team leads (RNs and LPNs) and nursing assistants report to the RN Manager. Administrator Voelker testified that RN Managers have authority to hire, discipline and suspend employees. There are examples in the record of RN Managers coaching nursing assistants and participating in the termination of an employee who was intoxicated. Administrator Voelker further testified that they have the authority to require employees in the nursing department to stay beyond their scheduled shifts and work overtime, and to send employees home even for non-disciplinary reasons. The RN Managers will do evaluations on team leads and nursing assistants, although the

evaluations are not tied to wage increases. While RN Managers have not yet been responsible for the hiring of employees, the Employer contends that this is only because of the limited time it has been operating.

During the weekends, an RN Manager works as the house supervisor. She is responsible for problem solving and must manage absence call-ins, call in the snowplow person if necessary, and move staff around the facility as needed. When faced with serious misconduct during the weekend, the RN Manager would most likely suspend an employee, start the investigation, and then confer with the Director of Nursing, rather than discharging an employee.

The job description of the RN Manager supports Voelker's testimony regarding their authority and clearly portrays the position as one having supervisory authority. For example, it reads: "SUPERVISES/ MANAGES: Registered Nurses, Licensed Practical Nurses and Nursing Assistants." And under the heading "Personnel Functions/Staff Development" it lists the following duties:

- Adjusts staffing as needed to meet resident census acuity and in accordance with budget.
- Participates in the interview and hiring of unit staff as directed by the Director of Nursing.
- Orients, coaches and disciplines staff in accordance with human resources policies and processes.

Employer Ex. 21.

In addition to Administrator Voelker's testimony regarding their supervisory authority and the job description's enumeration of such authority, there is evidence of RN Managers exercising this authority in coaching nursing assistants. The fact that not all RN Managers have exercised their supervisory authority as testified to by Voelker

and enumerated in their job description does not negate a finding of supervisory status, since it is long-settled that it is the existence, not the exercise, of the authority that determines whether an individual is a supervisor. *Famous Amos Chocolate Chip Cookie Corp.*, 236 NLRB 1093 (1978). I find that there is sufficient evidence to conclude that the RN Managers possess the authority to hire and discipline employees on their stations, and that therefore they are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the bargaining unit.

RN Supervisors

The RN Supervisors are the evening and weekend counterparts to the RN Managers. They begin work at the end of the day shift and work until the start of the day shift the next day. They also work weekends. Director of Nursing Moore testified that there is no discernible difference between the role of RN Managers and RN Supervisors during the RN Supervisors' shifts, although RN Supervisors are hourly paid and not on call when they are off work, whereas the RN Managers are salaried and on call when not at the facility. Administrator Voelker testified that during their shifts, RN Supervisors are "responsible for the overall building, so it would be any staffing issues, resident issues, ill residents, family issues, they take care of that." While not normally involved in hiring, they coach, discipline, and have been involved in terminations, although the terminations generally happen during the day shift. The RN Supervisors are responsible for the evaluations of the employees on the afternoon and night shifts. Like RN Managers, RN Supervisors are not given a patient load. The RN Supervisors also report to the Director of Nursing and receive management benefits. While RN

Supervisors are paid hourly and the RN Nurse Managers are salaried, their yearly income is the same.

The job description for the RN Supervisor lists the identical duties under the “Personnel Functions/Staff Development” as cited above for the RN Managers. In addition, however, it also includes: “Directs, delegates cares, coaches, teaches and disciplines staff to ensure resident care is delivered in accordance with resident care plans, professional standards of practice and in compliance with facility and federal/state regulations.” The Employer also presented specific examples of RN Supervisors exercising their authority to coach, discipline and adjust staffing. In particular, there is evidence that RN Supervisor Spence instituted a first-step reprimand against Kellie DeFosse for attendance problems. In addition, RN Supervisor Dulinski instructed a nursing assistant to seek medical care following a work-related injury and thereafter adjusted staffing to ensure there was adequate coverage (although this occurred prior to the Employer assuming the operation); and of mandating employees to stay and then sending them home when no longer needed during a snowstorm in December 2009. Finally, RN Supervisors can authorize employees to work overtime.

Because there is no evidence refuting the Employer’s position that RN Supervisors exercise the same authority as RN Managers, because the job description of the RN Supervisors supports the Employer’s position regarding the supervisory authority of RN Supervisors, and because the record contains specific examples of RN Supervisors disciplining employees, I conclude that they should be excluded from the unit because they are supervisors within the meaning of Section 2(11) of the Act.

RN Assessment Coordinators⁴

The role of the RN Assessment Coordinators is to collect information through observation of the residents, documentation in the charts, and from MDSs.⁵ This information collected by the RN Assessment Coordinators is submitted to the State of Minnesota, which uses the information to determine the reimbursement rate for each resident. Jamie Grills and Karen Gunski are the current RN Assessment Coordinators. They report to the Clinical Reimbursement Director. They don't supervise anyone during the normal course of the day. They are, however, in the weekend rotation as house supervisor with the RN Managers. They do not perform evaluations and are not involved in hiring employees. They could be involved in grievance meetings if there is a grievance related to a discipline issued during the time they are house supervisor.

In its brief, the Employer contends that the RN Assessment Coordinators should be excluded from the bargaining unit because they are managerial and/or supervisory employees and may have a confidential component as well. The Employer's evidence in this regard relies almost entirely upon the RN Assessment Coordinator's role in rotating as the house supervisor every seventh weekend.

In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), the Board reaffirmed its earlier decisions regarding the legal standard for determining supervisory status of

⁴ The petition initially listed this position as Clinical Reimbursement Nurse, but the Employer amended the petition at the hearing to reflect the correct title of RN Assessment Coordinator.

⁵ MDS references the Minimum Data Set, which is a part of the process for clinical assessment of residents in nursing homes and is provided to the State of Minnesota.

individuals who spend part of their time in a supervisory position and their remaining time in a unit or non-supervisory position. Specifically, the Board reiterated:

Under the Board's standard, "regular" means according to a pattern or schedule, as opposed to sporadic substitution. The Board has not adopted a strict numerical definition of substantiality and has found supervisory status where the individuals have served in a supervisory role for at least 10-15 percent of their total work time. We find no reason to depart from this established precedent.

Id. at 694 (footnotes omitted).

Even assuming that the RN Assessment Coordinators exercise supervisory authority within the meaning of Section 2(11) of the Act during their rotation as house supervisor, I find that the exercise of that authority amounts to less than 10 percent of their working time. Thus, it is not substantial and is insufficient to find them to be statutory supervisors.⁶ See *Carlisle Engineered Products, Inc.*, 330 NLRB 1359 (2000) (11 processors who substitute for admitted supervisors during one shift on weekends and during one-week slowdown period each year, which accounts for less than 4 percent of their annual working time substituting as supervisor, held not to be statutory supervisors as time substituting for admitted supervisor insubstantial); *Brown & Root, Inc.*, 314 NLRB 19, 20-21 (2004) (leadmen who substituted for foreman on three or four occasions during a 6-month period or for one week straight and, even assuming exercised statutory authority when substituting, not sufficient to clothe them with statutory authority). Cf. *Morristown-Hamblen Hospital Assn.*, 226 NLRB 76, 78 (1976) (nurse who is regularly scheduled as house nurse every other weekend, at least 16 hours during each 2-week pay period, and is ultimately responsible for 50-60 people

⁶ I note that neither party has raised any contention that the RN Assessment Coordinators should otherwise be excluded from the unit as professionals and recognize that the parties have already agreed to a mixed unit of professionals.

during that time, exercises supervisory authority on a sufficient basis to justify finding her to be a statutory supervisor).

The Employer contends that the RN Assessment Coordinators are also managerial and should be excluded from the unit on that basis. In support of this contention, the Employer cites the job description, which indicates that they work with an interdisciplinary team to “develop and implement appropriate action plans to correct MDS accuracy issues.” The Employer argues that this responsibility is analogous to that of the Board’s managerial finding of a clinical specialist in neonatology in *Sutter Community Hospitals of Sacramento, Inc.*, 227 NLRB 181 (1976).

I disagree with the Employer’s analysis, however, and find that the Board’s determination on the specialist in *Sutter* to be distinguishable from the duties of the RN Assessment Coordinators. Specifically, in *Sutter*, the Board relied upon the specialist’s involvement in the following:

development of the Employer’s newly established neonatology intensive care unit. In this capacity she is responsible for planning, initiating, directing, and evaluating nursing care for the parent-infant clientele of the Employer. Such work includes, but is not limited to, the development of new or improved methods of nursing care and the policies and procedures applicable thereto . . . [and] actually involves the formation of policies and procedures affecting nursing care.

Id. at 193. The record is devoid of any evidence that the RN Assessment Coordinators have any role in the formation of policies or procedures or the development of methods for the Employer. The limited reference in the job description to their work with an interdisciplinary team to develop action plans to correct MDS accuracy issues does not establish that they formulate or effectuate Employer policies. The Employer has not established that the RN Assessment Coordinators are managerial employees.

Finally, I also reject the Employer's contention that the RN Assessment Coordinators are confidential based upon their participation in the disciplinary process.

The Employer relies upon the following exchange in support of this contention:

Q: Would they be called upon to assist in the completion of an investigation into an employee's misconduct or performance?

A: They could be.

Q: Under what circumstances would they be involved in that?

A: Maybe to give background of what was going on the day that the grievance or the coaching was done. HR would probably lead it and get guidance from – or she would ask them for additional information.

Tr. 245-246. Voelker's testimony as to the possible role RN Assessment Coordinators "could" have in the disciplinary process is not only speculative, but also lacks the specificity required to establish their confidential status in this regard. See *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1335 (2000).

Staff Education Manager/Infection Control

Jean Singler is the Staff Education Manager. She is an RN. Administrator Voelker prepared the job description for this position, but contends that the position entails more than what is included in the job description. Voelker testified that Singler is more like an assistant director of nursing. She is the person on call when the Director of Nursing is not available and is in charge of the nursing staff in the absence of the Director of Nursing.

Singler does the orientation of all new employees, audits their work on the floor and provides additional training, as needed. Administrator Voelker testified that Singler also interviews and hires the nursing assistants and conducts interviews of nurses in

her role as Staff Education Manager. The Employer offered into evidence hiring records which indicate that Singler interviewed and offered positions to five nursing assistants as recent as the month prior to the hearing.

Voelker testified that Singler has also participated in the investigation of an incident of verbal abuse to a resident which resulted in the termination of the staff member. The Employer also offered documentation filled out by Singler reporting the incident to the Minnesota Department of Health and indicating that Singler interviewed the afternoon supervisor and team lead about the incident, while the RN Manager interviewed the staff member who reportedly made the remark.

Singler can require employees to work overtime and is involved in assessing probationary employees. She also observes employees that have been reported as needing more training and decides what training to provide or whether the person should not continue employment. In this respect, Administrator Voelker testified:

I see her as the person that's very much involved to make a decision if somebody should continue employment at Chris Jensen or not. If there is additional training needed because of – there's a violation of, you know, for like an investigation if somebody was rude. That's not a reason to fire someone but it's a reason maybe to provide them more training, and Jean's the person that would setup that training, and if the incident happened again – Jean is very critical in working with the director of nurses or the nurse manager, whoever is over the person, to decide if the person should continue working at Chris Jensen.

Tr. 162. Singler's submission to the State on the incident of verbal abuse supports Voelker's testimony. In her report, Singler wrote: "After I reviewed the interviews and spoke with the other staff, it was decided that Ms. Wess would be terminated from our employment."

Singler has also created a new razor policy for infection control, which she adapted from the Health Dimensions basic nursing policy book. She ordered an infection control manual by the State and purchased an Alzheimer's behavioral video as part of the education budget.

Based on the evidence that Singler interviews and hires nursing assistants; participates in the investigations of employee misconduct; and at least effectively recommends, if not decides termination decisions, I find that Singler is a statutory supervisor within the meaning of Section 2(11) of the Act and that therefore she should be excluded from the bargaining unit.

Administrative Assistant/Volunteer Coordinator

The Administrative Assistant/Volunteer Coordinator is the result of a combination of the part-time position of Volunteer Coordinator with a newly created position of Administrative Assistant. Cathy Wojtsyckiak holds the position and has an office near the Administrator's office. While the position was created in March, Wojtsyckiak's first day in the position was the first day of the hearing.

As the Volunteer Coordinator, Wojtsyckiak oversees the volunteers. However, it is in her role as Administrative Assistant that the Employer contends that she is a confidential employee. She is expected to complete projects for the Administrator, such as filling out Form 2567—a form required by the State for the facility to respond with a plan of action for each cited deficiency. In addition, Voelker testified that as Administrative Assistant, Wojtsyckiak is expected to filter/narrow solicitations and act as the non-medical backup when the Administrator is out of the building. Voelker further testified that Wojtsyckiak will assist Voelker in labor relations. In particular, Wojtsyckiak will

be expected to respond to requests for information from the Union, assist in fact gathering, and take notes and minutes for the parties at grievance meetings. In addition, Wojtsyiak will have access to the confidential labor relations notes in the Administrator's office and will be expected to prepare Employer proposals for presentation at bargaining. She will attend monthly management meetings and will be doing the minutes for meetings.

While all of the testimony regarding Wojtsyiak's expected duties lacks specificity because the position is newly created and Wojtsyiak had not yet completed her first day on the job as of the date of the hearing, I nonetheless conclude that Wojtsyiak's role as Administrative Assistant makes her a confidential employee. In particular, Wojtsyiak's expected role in assisting Voelker with collective-bargaining negotiations and grievances is sufficient to make her a confidential employee. In this regard, the record is very clear that the Administrator has been involved with negotiations with the Union and will continue in that role and will have a role in grievance processing. Thus, it appears Wojtsyiak will have access to and be expected to prepare the Employer's proposals for bargaining before they are presented to the Union. This is enough to constitute confidential status within the meaning of Board law. See *Bakersfield Californian*, 316 NLRB 1211, 1213 (1995).

Assistant to the HR Director/Payroll/Accounts Payable Specialist

LeAnn Ulvi is the Assistant to the HR Director/Payroll/Accounts Payable Specialist. In her role as Payroll/Accounts Payable Specialist, Ulvi processes payroll and accounts payable for the business office and audits employees' files. It is in her role as Assistant to the HR Director that the Employer contends Ulvi is a confidential

employee. In this role, Ulvi assists in HR functions. For example, if there is an involuntary termination, Ulvi is responsible for doing the calculations for the final paycheck. In addition, HR Director Conley testified that she expects Ulvi will assist with Conley's labor relations duties by filing the grievances and gathering information; running reports; downloading information into Excel; and doing "what if" scenarios, such as what would the impact on payroll be for a 1 percent increase, for Conley's use in negotiations with the Union. Conley further testified that Ulvi has a key to her office, where she keeps confidential files on employees.

The Employer relies upon the Second Circuit's decision in *NLRB v. Meenan Oil Co., L.P.*, 139 F.3d 311 (2nd Cir. 1998), for its contention that Ulvi's role in assisting Conley by gathering information and doing "what if" scenarios makes her a confidential employee. In *Meenan Oil*, the Court reversed the Board's finding and held that an executive secretary and a payroll/personnel administrator were confidential employees based on their assistance to the general manager in preparing the annual profit plan. The Court recognized that their assistance in the preparation of the annual profit plan gave them access to the projected wage and salary data for both union and non-union employees months before they were implemented, and such information in the hands of the union would give it a significant strategic advantage in bargaining. *Id.* at 318.

I find the record evidence, however, distinguishes Ulvi's role from that of the executive secretary and payroll/personnel administrator in *Meenan Oil*. Here, there is no evidence that Ulvi will have access to the actual projected wage and salary data prior to its implementation. Although HR Director Conley testified that she expects Ulvi will assist her in preparing "what if" scenarios such as what the impact on payroll will be for

a 1 percent or 2 percent wage increase, there is no evidence to suggest that Ulvi will have knowledge on what actual proposals the Employer makes to the Union prior to negotiations. Unlike Administrative Assistant Cathy Wojtsyak, who is expected to prepare Employer proposals for presentation at bargaining, there is no evidence that Ulvi will have any role in preparing proposals other than gathering data for Conley's use. Board law makes clear that the provision of personnel and statistical information for use in negotiations or grievance handling is not sufficient to confer confidential status on an employee. *American Radiator and Standard Sanitary Corp.*, 119 NLRB 1715, 1720-1721 (1958) (the personnel and welfare clerk has no way of determining from the statistical data prepared by him what labor policy proposals may result). Nor does the access to material relating to payroll records, accounts receivable, or even personnel files necessarily render an employee confidential. *Associated Day Care Services of Metropolitan Boston*, 269 NLRB 178, 181 (1984). The Employer has failed to demonstrate that the Assistant to the HR Director/Payroll/Accounts Payable Specialist is a confidential employee.

Assistant to Director of Nurses/Scheduler⁷

Allison Pagnac is the current Assistant Director of Nurses/Scheduler. Her primary role is to provide the scheduling for the nursing department. In addition, she tracks attendance and informs supervisors when discipline is warranted. For scheduling she looks at the census for each area and determines how much staff is needed for the area for all three shifts, and then covers holes. Pagnac can request

⁷ This position has also been referenced as the Assistant to the Director of Nurses/Staffing Coordinator and Staffing Coordinator/Administrative Assistant to Director of Nursing.

employees to stay later when necessary, but has no authority to require them to stay beyond their scheduled shift or to work overtime. Through her role as Scheduler, Pagnac gets information about employee status such as terminations, layoffs, and people on FMLA leave so that she can take them off the schedule.

Pagnac is also involved in hiring nursing assistants. She does the spot interviewing when a person comes in and fills out an application, and she conducts background checks and calls for references. She offers jobs, determines wages, and schedules their orientation. The record contains several examples of documentation Pagnac filled out during interviews of prospective nursing assistants, as well as records of Pagnac offering positions to applicants.

In addition to interviewing and offering positions to nursing assistants, Pagnac has a role in determining their starting wages. Although wages are based on a grid, Pagnac determines whether an individual's experience is credited for purposes of computing the starting wage. For example, Pagnac determined that one individual's experience in a hospital, which was not in the role of nursing assistant, did not count toward his experience for purposes of determining his wage.

Based on the evidence that Pagnac has the authority to interview and hire nursing assistants and determine where their starting wage falls in the Employer's formula, I find that Pagnac is a statutory supervisor within the meaning of Section 2(11) of the Act and therefore should be excluded from the bargaining unit.

The Employer contends that in Pagnac's role as the Assistant to the Director of Nurses, she will have access to information on negotiations and thereby should be excluded as a confidential employee. However, no specific evidence was offered as to

Pagnac's expected role. Since I have already found that Pagnac should be excluded as a statutory supervisor, I find it unnecessary to address the confidential employee issue.

Social Workers

Dave Johnson and Linda Solstrand are the Employer's two Social Workers. To work in a nursing home, one must be a licensed social worker, which requires a bachelor's degree in social work. In addition, one must maintain a license through continuing education. The Employer's two Social Workers are licensed by the State of Minnesota and are advocates for the residents and family. They attend care conferences, do care planning, and submit information to the MDS.

The Employer argues that the Social Workers are confidential employees based on their role in participating in vulnerable adult investigations that may result in disciplinary action against an employee. The Employer argues that these investigations typically generate confidential employment information because if it does not result in discipline, the information is not provided to the Union or the employees.

I am not persuaded by the Employer's argument on the confidential status of Social Workers. While Social Workers play a role in investigating allegations of abuse or neglect that may ultimately lead to disciplinary action against an employee, there is no evidence that Social Workers will have any involvement in the grievance process or other labor relations other than to report the facts that they have uncovered. Having access to confidential information, even confidential labor relations material, is not sufficient to confer confidential status. *The Los Angeles New Hospital*, 244 NLRB 960 (1979), *enfd.* 640 F.2d 1017 (9th Cir. 1981). Moreover, retrieving information that they maintain in the normal course of their occupation for management to use to make a

disciplinary or grievance determination is not sufficient to confer confidential status on employees. See *Inland Steel Company*, 308 NLRB 868 (1992) (merely retrieving information from personnel files to subsequently be used by management personnel in making grievance determinations not sufficient to establish confidential status). Finally, access to confidential information is not a sufficient reason for denying employees representation by a union. Rather, the Board has “limited its exclusionary definition of ‘confidential’ employees to those who have a confidential relationship to officials charged with the responsibility of formulating, determining, and effectuating labor relations policies.” *Fairfax Family Fund, Inc.*, 195 NLRB 306, 307 (1972).

While I am not excluding the Social Workers based on their confidential status, I am nonetheless clarifying the unit to exclude them. There is no dispute that the Social Workers are professional employees and that they have never been included in a unit with non-professionals. Prior to the Employer’s assumption of operations, the Social Workers were in a separate social workers bargaining unit. As no party has filed a petition for a *Sonotone* election for the Social Workers to choose to be part of a unit of mixed professionals and non-professionals, I do not need to decide that issue at this time.

Conclusion

In view of the above and the record as a whole, I find that the Employer has established that the Administrator, Director of Nursing, Business Office Manager, Environmental Services Director, Maintenance Director, Admissions Director, Human Resources Director, Clinical Reimbursement Director, Dietary Director, Health Information Director, Social Services Director, Activities Director, RN Managers, RN

Supervisors, Staff Education/Infection Control Manager, Assistant to Director of Nurses/Scheduler, and Administrative Assistant/Volunteer Coordinator are statutory supervisors, managerial employees or confidential employees and that their inclusion in the bargaining unit violates the statutory or policy principles of the Act. Thus, clarification of the unit to exclude them is appropriate. I further find that the Employer has not established that the RN Assessment Coordinators and HR/Payroll/Accounts Payable Specialist are supervisory, managerial, or confidential employees. In addition, I find that the Social Workers have been historically excluded from the agreed-upon unit of mixed professionals and non-professionals. Accordingly, I shall issue an order clarifying the unit to exclude from the existing agreed-upon bargaining unit the Administrator, Director of Nursing, Business Office Manager, Environmental Services Director, Maintenance Director, Admissions Director, Human Resources Director, Clinical Reimbursement Director, Dietary Director, Health Information Director, Social Services Director, Activities Director, RN Managers, RN Supervisors, Staff Education/Infection Control Manager, Assistant to Director of Nurses/Scheduler, Administrative Assistant/Volunteer Coordinator, and Social Workers.

IT IS HEREBY ORDERED that the unit is clarified to exclude Administrator, Director of Nursing, Business Office Manager, Environmental Services Director, Maintenance Director, Admissions Director, Human Resources Director, Clinical Reimbursement Director, Dietary Director, Health Information Director, Social Services Director, RN Managers, RN Supervisors, Staff Education/Infection Control Manager, Assistant to Director of Nurses/Scheduler, Administrative Assistant/Volunteer Coordinator, and Social Workers.

Right to Request Review. Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 - 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review. Pursuant to the Board's Rules and Regulations, Sections 102.111–102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on **May 19, 2010**, at 5:00 p.m. Eastern Time, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this

proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab and then click on the E-filing link on the pull-down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was offline or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Minneapolis, Minnesota, this 5th day of May, 2010.

/s/ Marlin O. Osthus

Marlin O. Osthus, Regional Director
National Labor Relations Board
Region Eighteen
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Minneapolis, Minnesota 55401